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IN THE

Supreme Court of the United States

October Term, 1974

No. 74-5808

ABRAHAM FRANCIS,

Petitioner,

v.

C. MURRAY HENDERSON, Warden,
Louisiana State Penitentiary,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR PETITIONER

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OPINIONS BELOW

The original opinion of the United States District Court for the Eastern District of Louisiana is unreported. A copy of that decision is at pages 87-92 of the Appendix. The opinion of the United States

Court of Appeals for the Fifth Circuit is reported at 496 F.2d 896 (5th Cir. 1974). It is reprinted in the Appendix at pages 94-100.

JURISDICTION

The original decision of the Court of Appeals was entered on June 28, 1974. A timely petition for rehearing and rehearing *en banc* was filed and was denied on October 7, 1974. 502 F.2d 1167. The petition for a writ of certiorari was filed on January 4, 1975. Certiorari was granted on April 28, 1975. The jurisdiction of this Court rests on 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

I.

DO *FAY V. NOIA*, 372 U.S. 391 (1963) AND *JOHNSON V. ZERBST*, 304 U.S. 485 (1938) PROVIDE THE STANDARD FOR DETERMINING WAIVER AND THE AVAILABILITY OF FEDERAL HABEAS CORPUS RELIEF FOR A CONVICTED STATE PRISONER WHO DID NOT COMPLY WITH STATE PROCEDURAL RULES FOR CHALLENGING THE GRAND JURY WHICH INDICTED HIM?

II.

IF *DAVIS V. UNITED STATES*, 411 U.S. 223 (1973) PROVIDES THE STANDARD BY WHICH TO JUDGE THE AVAILABILITY OF FEDERAL HABEAS CORPUS RELIEF FOR A CONVICTED STATE PRISONER WHO DID NOT COMPLY WITH STATE PROCEDURAL RULES FOR CHALLENGING THE GRAND JURY WHICH INDICTED HIM, IS THE TEST ONE OF "CAUSE" OR MUST A PETITIONER SHOW "ACTUAL PREJUDICE"?

CONSTITUTIONAL PROVISION INVOLVED

Constitution of the United States, Amendment XIV, Section 1:

. . . nor shall any state deprive any person of life, liberty, or property without due process of law. . .

STATUTORY PROVISION INVOLVED

Louisiana, Revised Statutes, Title 15, Section 202.

All objections to the manner of selecting or drawing any juror or jury or to any defect or irregularity that can be pleaded against an array or venire must be filed, pleaded, heard or urged before the expiration of the third judicial day of the term for which said jury shall have been drawn, or before entering upon the trial of the case if it be begun sooner; otherwise, all such objections shall be considered as waived and shall not afterwards be urged or heard.

TITLE 28 U.S.C. §2254

§2254. State Custody; remedies in Federal courts

(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

(b) An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.

(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

(d) In any proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction in a proceeding to which the applicant for the writ and the State or an officer or agent thereof were parties, evidenced by a written finding, written opinion, or other reliable and adequate written indicia, shall be presumed to be correct, unless the applicant shall establish or it shall otherwise appear, or the respondent shall admit–

(1) that the merits of the factual dispute were not resolved in the State court hearing;

(2) that the factfinding procedure employed by the State court was not adequate to afford a full and fair hearing;

(3) that the material facts were not adequately developed at the State court hearing;

(4) that the State court lacked jurisdiction of the subject matter or over the person of the applicant in the State court proceeding;

(5) that the applicant was an indigent and the State court, in deprivation of his constitutional right, failed to appoint counsel to represent him in the State court proceeding;

(6) that the applicant did not receive a full, fair, and adequate hearing in the State court proceeding; or

(7) that the applicant was otherwise denied due process of law in the State court proceeding;

(8) or unless that part of the record of the State court proceeding in which the determination of such factual issue was made, pertinent to a determination of the sufficiency of the evidence to support such factual determination, is produced as provided for hereinafter, and the Federal court on a consideration of such part of the record as a whole concludes that such factual determination is not fairly supported by the record:

And in an evidentiary hearing in the proceeding in the Federal court, when due proof of such factual determination has been made, unless the existence of one or more of the circumstances respectively set forth in paragraphs numbered (1) to (7), inclusive, is shown by the applicant, otherwise appears, or is admitted by the respondent, or unless the court concludes pursuant to the provisions of paragraph numbered (8) that the

record in the State court proceeding, considered as a whole, does not fairly support such factual determination, the burden shall rest upon the applicant to establish by convincing evidence that the factual determination by the State court was erroneous.

(e) If the applicant challenges the sufficiency of the evidence adduced in such State court proceeding to support the State court's determination of a factual issue made therein, the applicant, if able, shall produce that part of the record pertinent to a determination of the sufficiency of the evidence to support such determination. If the applicant, because of indigency or other reason is unable to produce such part of the record, then the State shall produce such part of the record and the Federal court shall direct the State to do so by order directed to an appropriate State official. If the State cannot provide such pertinent part of the record, then the court shall determine under the existing facts and circumstances what weight shall be given to the State court's factual determination.

(f) A copy of the official records of the State court, duly certified by the clerk of such court to be a true and correct copy of a finding, judicial opinion, or other reliable written indicia showing such a factual determination by the State court shall be admissible in the Federal court proceeding.

STATEMENT OF THE CASE

Certiorari was granted in this case to review a decision of the United States Court of Appeals for the Fifth Circuit which held that a Louisiana defendant who failed to make a timely challenge to the grand jury which indicted him was precluded from maintaining that challenge in a federal habeas corpus action unless

he could demonstrate "actual prejudice" flowing from his indictment. Only such a showing, according to the opinion below, would excuse his non-compliance with the state procedural rule.

The Fifth Circuit opinion vacated the judgment of the United States District Court for the Eastern District of Louisiana which had held that the petitioner did not knowingly and intelligently waive his state court right to make a grand jury challenge and that in any event, he had shown "cause" which excused his failure to make a timely challenge.

This case began in New Orleans, Louisiana in 1964.

A. The Original Trial Proceedings.

On December 10, 1964, Abraham Francis, a black 17 year old boy, was indicted on a charge of felony murder by the Orleans Parish grand jury. App. 8-9. The charge was an outgrowth of a robbery of a white couple by several black males in which one of the alleged robbers was killed. It was the first time in the recollected history of Orleans Parish that a person had been charged with felony murder when the deceased was a co-perpetrator. App. 71. At the time of the alleged offense, Francis was 16 years old. App. 56. Death was the maximum penalty which could be imposed.

Two months later on February 9, 1965, the State trial judge appointed an attorney for Francis. App. 12. The lawyer, A. P. Tureaud, a black New Orleans attorney, "Hadn't handled any criminal matters for years." App. 31. He, "Hadn't handled a murder case in about fifteen years." App. 23.

Because of Tureaud's lack of experience, he asked Earl J. Amadee, another black New Orleans lawyer, to assist him as a "trial expert." App. 27.[1]

The day before trial, June 23, 1965, Tureaud filed his first motion, a Motion for Continuance. App. 13. He sought a continuance so that he could have additional time to file motions "appropriate to [Francis'] defense." App. 13. On the same day Tureaud and Amedee filed a Prayer for Oyer, an application for Bill of Particulars, and a Motion to Quash the Indictment on the ground that it was vague. App. 14-18.[2] None of the motions were granted, except that

[1]The facts surrounding Francis' trial representation were elicited in a 1971 hearing on the habeas corpus petition that he filed in State court seeking an out of time appeal and other relief. App. 22. The description of the events which occurred then was provided by Amadee. Tureaud (his name is incorrectly spelled "Touro" in the transcript), who Amadee described as "very old", was seriously ill at the time of the state habeas hearing. App. 27. He is now dead.

Amadee had been "co-appointed" to represent one of the original co-defendants, Jerry Anderson. App. 26-27. It seems that he also had some representative interest in a third co-defendant, Paul Honore. App. 28. Honore had his own appointed counsel, but Amadee described his role with Honore this way:

> If you want to consider me as co-counsel you can. I hate to say it, Honore was my client and I am trying to help him, he was related to me your Honor. App. 28.

Anderson and Honore pled guilty prior to trial and each received a sentence of eight years. App. 8.

[2]The Motions were merely copies of motions which had been filed for another defendant with the name of that defendant struck through in pen and Francis' name substituted. The Motion for a Continuance was a form used by the District Attorney which Tureaud, by striking through with a pen, adapted for his own use. See original trial record.

some response was made by the State to the Bill of Particulars and Prayer for Oyer which the trial judge deemed to be sufficient. App. 55. No challenge was made to the grand jury which returned the indictment.

On the day of trial, Tureaud and Amadee filed a Motion to Suppress aimed at excluding the statements that Francis had made to the police. App. 19. It was denied without a hearing. App. 52-53. Amadee felt strongly that good constitutional grounds existed to support the Motion and he recalled that he reserved a bill of exception to the denial. App. 34-35, 39. The record did not reflect the reservation of a bill of exception. App. 62-63.

Francis' trial took one day – June 24, 1965. He was convicted of felony murder and on June 29, 1965 received a sentence of life imprisonment. App. 9.

Amadee testified that Francis desired an appeal, but he and Tureaud advised against it because they thought that he might then be prosecuted on the robbery charge which was the underlying basis for the felony murder indictment, and receive an additional thirty year imprisonment. App. 35.[3] Amadee and Tureaud had other reasons for advising against an appeal. Amadee explained:

> Well, I think that everybody felt that the jury had been lenient on him because of his youth and he got a break that they did not find him guilty as charged [no death sentence] and I am not going to kid, we did not want to be tied up with the

[3]The "general consensus" was that a term of years could not be imposed consecutively to a life sentence. One of the men who prosecuted Francis testified to that and also said that he did not know of any cases where it had been done. App. 67.

rest of our lives with a court appointed case. When we heard the facts throughout the trial and as it appears to us, we would be wasting our time as lawyers.

App. 36.

The Court did not inform Francis of his right to appeal. The colloquy on that issue was:

Q. Does this Defendant state at this time that he does not intend to take an appeal?

A. I am not.

App. 21.

Thus, Abraham Francis, a "terrified young 17 year old," App. 37, began his life sentence.

B. The State Post Conviction Proceedings and the Failure to Challenge The Grand Jury.

In September 1970, Francis wrote to the Judge who presided over his trial and requested a transcript of the proceedings. Because no appeal had been taken and because no specific errors were alleged in the letter, the Judge refused to provide a transcript to Francis. App. 76. On June 10, 1971, Francis filed a *pro se* petition for writ of habeas corpus in the State trial court. He alleged that he was denied his right to appeal, sought a trial transcript so he could appeal, and alleged that he had been indicted by a grand jury from which Negroes were excluded. App. 76. The court appointed counsel for Francis and on June 28, 1971 conducted the hearing which elicited the Amadee testimony.

Amadee stated, and the record reflected, that he was never formally appointed to represent Francis. His

informal role before and during the trial was ambiguous. App. 27, 31. But there is no doubt that Tureaud was "chief counsel" and ultimately responsible for Francis' representation. App. 31. Amadee placed the failure to challenge the grand jury composition squarely upon Tureaud's shoulders:

Q. Can you tell the Court is there any reason why you didn't attack the Grand Jury set up or the Petit Jury set up in Orleans Parish in your motion to quash?

A. I would believe and not trying to pass the buck that Mr. Touro didn't want to do it. There were blacks on the Grand Jury and black (sic) in the Petit Jury panel and he has his own ideas about things, you know.

Q. Did you all discuss that fact as whether you all should attack the Venire of the Grand Jury and the Petit Juries of Orleans Parish?

A. I don't recal (sic) but like I said, if we did I am of the opinion he wouldn't have done it because Mr. Touro is a man that doesn't believe in what he calls wasted effort.

Q. Did you feel at that time or you recall – this is six years ago, do you feel it would have been a wasted effort to file such a motion at that time?

A. Like I told you, I wasn't in the case at the outset, I was representing a co-defendant by the name of Jerry Anderson. It was only – I would say some several months before the trial that Mr. Touro asked me to come into the Francis case. Mr. Touro had been his attorney I would say maybe some four or five months before I came into the case. When you come into a case like that sort of haphazard things that have been done, you don't question them and apparently I didn't.

Q. Were you aware that any attacks on the make-up of the Grand Jury and Petit Juries or Orleans Parish were being made at that time through the Labat and Merrit case?

A. I knew they were being made and I made it in quite a few cases myself.

* * *

Q. Would you state again, if you have already stated the reason why you didn't make that attack?

A. On the jury?

Q. Yes.

A. One thing I came into the case kind of late, I came in as a trial expert to help Mr. Touro to select juries and whatnot. Things done previous thereto was Mr. Touro's business. I did tell him I thought he ought to have a Bill of Particulars and Prayer for Oyer and he did that. I can't question what he did four or five months before I came in as a trial expert and that's my job.

App. 26-27.

Francis had not been informed that his attorneys did not attack the Grand Jury system. At that time, he was not even aware of the availability of such an attack. App. 61.

Upon that record, the trial judge denied the petition saying:

> . . .it is the finding of this Court that the Defendant was represented by competent counsel; that he knew of his right to appeal but chose, upon advice of his attorneys and parents, not to do so, as corroborated by his statement in open court at the time of his sentencing; that the attack on the Grand Jury Venire was considered by his attorneys who chose not to make such an attack; and, is now prescribed [sic].
>
> App. 78.

Thereafter the Louisiana Supreme Court rejected Francis' combined petition for writ of certiorari and petition for writ of habeas corpus. App. 79.

C. The Federal Habeas Corpus Proceeding.

On March 3, 1972, Francis filed his *pro se* petition for writ of habeas corpus in the United States District Court for the Eastern District of Louisiana. App. 1. Counsel was appointed for him. The state responded and filed the complete record of the state court trial and habeas proceedings. App. 5. An evidentiary hearing was held before a magistrate, but not transcribed and thus not relied upon by the district court. A magistrate's hearing in two other cases which examined the jury selection practices in Orleans Parish was utilized by the district court. The evidence adduced at that hearing established that from 1943 until August 15, 1966, the Orleans Parish Jury Commission intentionally and systematically excluded people who were paid by the hour and lost their wages if called for jury duty. App. 81.

The practice ended on August 15, 1966 when the Fifth Circuit, *en banc*, found in *Labat v. Bennett*, 365 F.2d 698:

> (A) The exclusion of daily wage earners as a class violates the petitioner's due process and equal protection rights to an impartial jury representing a cross-section of the community. (B) The exclusion of this large class, 47 percent of all Negro workers in Orleans Parish, as the district judge found, discriminates against Negroes in violation of the equal protection clause in that the class contains a disproportionately large number of

> Negroes. (C) Contrary to the district court's holding there is no Louisiana statutory authority permitting jury selection officials to exempt daily wage earners as a class.
>
> *Id.*, 365 F.2d at 719-720, *cert. den.* 386 U.S. 991 (1967).
>
> (App. 91-92, quoted in opinion of the district court).

Referring to the information and statistics in the Magistrate's report and the Fifth Circuit decision in *Labat*, the district court held: "...the conclusion that the grand jury [which indicted Francis] was defective is inescapable." App. 91.[4]

[4]In the Fifth Circuit the State's Brief (pp. 7-16) argued that Francis and Henderson (a consolidated appellee) were estopped from challenging grand jury selection practices because the Louisiana Supreme Court had held, upon an extensive record, that the 1962 Orleans Parish Grand Jury had been properly selected. *State v. Barksdale*, 170 So.2d 374 (1964). Therefore, the state argued, the *Barksdale* record and holding were presumed to be correct in the absence of a showing of inadequacy under 28 U.S.C. §2254(d).

Francis is, of course, not estopped by the *Barksdale* record. He was indicted in 1964. He was not a party to the *Barksdale* record, as §2254(d) required. He was not even a party to the magistrate's hearing in Henderson which was referred to by the district judge. But the state was a party to that hearing and although it may have been violative of *Wingo v. Wedding*, 418 U.S. 461 (1971), the state never raised the propriety of the magistrate's hearing on appeal. Consequently, it is foreclosed from attacking that proceeding now. Therefore the finding that the grand jury which indicted Francis was defective must now be considered factually established.

Louisiana law stated:

> All objections to the manner of selecting or drawing any juror or jury or to any defect or irregularity that can be pleaded against an array or venire must be filed, pleaded, heard or argued before the third judicial day of the term for which said jury shall have been drawn, or before entering upon the trial of the case if it be begun sooner; otherwise all such objections shall be considered as waived and shall not afterwards be argued or heard.[5]

The court, relying upon the factual record developed at the state habeas proceeding, found that Francis had not intentionally relinquished, abandoned or waived his right to object to the grand jury's composition, and held that federal habeas was still open to him under *Fay v. Noia*, 372 U.S. 391 (1963) and *Johnson v. Zerbst*, 304 U.S. 458 (1938).[6]

[5]The relevant statute was LSA-R.S. 15:202. It was repealed and replaced in 1967 by L.S.A. C. Cr. P. Art. 535 which permits a grand jury challenge until 3 days before trial, or with permission of the court, at any time before commencement of the trial.

[6]The term of the grand jury which indicted Francis expired on March 1, 1965. (See Francis' Fifth Circuit Brief p. 6, n. 7 and *Michel v. Louisiana*, 350 U.S. 91, 93 (1955) which reflect that the September term of an Orleans Parish grand jury expires after 6 months, or on March 1 of the following year.) Therefore Francis, who was indicted on December 10, 1964, would have had to make his objection by March 4, 1965. Counsel was appointed for him on February 9, 1965. App. 12. He had been arraigned on December 16, 1964, pled "not guilty" and was given "15 days for pleadings" App. 9, although he obviously had no lawyer. The tardy appointment of counsel was under the then applicable provision of LSA R.S. 15:143 which said:

> Whenever an accused charged with a felony shall make affidavit that he is unable to procure or employ counsel

The district court distinguished *Davis v. United States*, 411 U.S. 233 (1973) but alternatively found, if *Davis* were applicable, that Francis had shown "cause" which entitled him to federal habeas relief. App. 91. The cause was the inepteness of Francis' counsel. App. 91.[7]

Having found that the grand jury which indicted Francis was unconstitutionally composed and that Francis was entitled to federal habeas corpus relief, the court set aside the conviction and ordered a new indictment and trial for Francis. App. 93.[8]

The State of Louisiana appealed to the Fifth Circuit.

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learned in the law, the court before whom he shall be tried, or some judge thereof, shall immediately assign to him such counsel.

Of course, the key to the finding of no waiver was the utter failure of Francis' counsel after his appointment. Francis never had knowledge of the jury challenge right. App. 61.

[7]The Fifth Circuit put the district court's finding of "cause" this way:

> The factual basis for the court's finding was that Francis had been represented by a civil lawyer, unskilled in the intricacies of criminal practice, who had, by his inexperience, allowed the time for challenging the indictment to pass without objecting to the grand jury's composition.
>
> *Newman and Francis v. Henderson*, 496 F.2d 896, 897 (5th Cir. 1974).
> App. 97.

[8]The district court also held that Francis did not waive his right to appeal and awarded him an out of time appeal in state court. App. 90. The state did not contest that finding in their appeal to the Fifth Circuit. However, an out of time appeal would be superfluous, since if the district court was correct in granting habeas relief to Francis, all of the proceedings which followed the original invalid indictment fall and he would be entitled to a new indictment free from constitutional defects, and a new trial on the indictment.

D. The Fifth Circuit Decision.

Until this court's decision in *Davis v. United States*, 411 U.S. 233 (1973), the Fifth Circuit adhered to the knowing, intelligent waiver standards of *Johnson v. Zerbst*, 304 U.S. 458 (1938) and *Fay v. Noia*, 372 U.S. 391 (1963) in deciding grand jury collateral attacks brought by state petitioners who had not timely raised their claims in state courts. *Labat v. Bennett*, 365 F.2d 698,707-711 (5th Cir. *en banc* 1966); *Winters v. Cook*, 489 F.2d 174 (5th Cir. *en banc* 1970).

After the decision in *Davis* the Fifth Circuit applied its reasoning to state prisoners seeking federal habeas corpus relief and held that they too would be barred from collaterally attacking an indictment unless a timely pretrial objection had been made or unless "cause" was shown to excuse the operation of the waiver provision.[9]

In Francis' case, the Fifth Circuit imposed a harsher rule. Because the Louisiana waiver provision was absolute and contained no "cause shown" escape clause, the court engrafted an "actual prejudice" exception on the statute. The court held that Francis' non-compliance with the state procedural requirements would be excused only if he could demonstrate "actual prejudice." Since the district court judgment did not deal with prejudice, it was vacated and the case remanded "to permit a determination of whether the facts presented by Francis constitute a showing of prejudice." 496 F.2d at 899, App. 100.

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[9]*Jones v. Henderson*, 494 F.2d 47 (5th Cir. 1974); *Marlin v. Florida*, 489 F.2d 702 (5th Cir. 1974); *Rivera v. Wainwright*, 488 F.2d 275, (5th Cir. 1974).

Francis' Petition for Rehearing and Rehearing *en banc* was denied. 502 F.2d 1167. His Petition for Writ of Certiorari was granted by this Court on April 28, 1975.

SUMMARY OF ARGUMENT

I. *Johnson v. Zerbst*, 304 U.S. 458 (1938) and *Fay v. Noia*, 372 U.S. 391 (1963) established that a convicted state prisoner is entitled to be heard in a federal habeas corpus action unless he knowingly and intelligently waived his constitutional rights in state court or unless he deliberately by-passed his state court remedies. The Court has reaffirmed those principles in many cases, most recently doing so in *Lefkowitz v. Newsome*, ____ U.S. ____, 95 S.Ct. 886, 43 L.Ed.2d 196 (February 19, 1975).

While the Court has not explicitly applied the *Johnson - Fay* test to grand jury discrimination challenges which were not preserved in the state proceedings, it has applied it to combined grand and petit jury challenges which were tardy without drawing any distinction between the two. *Peters v. Kiff*, 407 U.S. 493, 494 n. 1 (1972). *Whitus v. Balkcom*, 370 U.S. 728 (1962), discussed in *Whitus v. Georgia*, 384 U.S. 545, 547-548 (1967). The Circuit Courts of Appeals have applied the *Johnson-Fay* test to grand jury challenges. *Labat v. Bennett*, 365 F.2d 698 (5th Cir. *en banc* 1965); *McNeil v. North Carolina*, 368 F.2d 313 (4th Cir. 1966); *Henderson v. Tollett*, 459 F.2d 237 (6th Cir. 1972), rev'd on other grounds, *Tollett v. Henderson*, 411 U.S. 233 (1973); *Wade v. Yeager*, 377 F.2d 841 (3rd Cir. 1967).

The *Johnson - Fay* test was not foreclosed in grand jury challenge cases by *Davis v. United States*, 411 U.S. 233 (1973). *Davis* is limited to federal prisoners whose federal habeas corpus rights were limited by congressional adoption of the specific waiver doctrine contained in Rule 12(b)(2), Fed. R. Crim. Proc. Since Congress did not similarly preclude state prisoners, no analogous argument can be made to preclude those petitioners.

On the contrary, the historical importance of the writ, the policy that constitutional rights should not be denied "without the fullest opportunity for plenary federal judicial review", the concerns over the availability of state remedies to guarantee those rights and the "institutional constraints" on this Court's certiorari jurisdiction are compelling reasons for according state petitioners access to federal habeas corpus under the *Johnson - Fay* standards. *Fay v. Noia, supra* and *Kaufman v. United States*, 394 U.S. 217 (1969).

Those reasons are strengthened by the longstanding failure of some states to follow the law barring discrimination in grand jury selection. Since 1880 in *Strauder v. West Virginia*, 100 U.S. 303, the Court has had to contend with a constant stream of cases which involved deficient grand jury selection methods. The availability of federal habeas corpus, under the *Johnson - Fay* standard, has been an important factor in correcting grand jury racial discrimination. There is no cause to now adopt a standard which would make it more difficult to assert and protect constitutional rights guaranteed for nearly a century.

Under the *Johnson - Fay* test the petitioner is entitled to relief. It is undisputed that he did not know of the availability of such a challenge nor did he or his

lawyer fail to make it for any strategic or tactical reason.

II. Even if *Davis v. United States*, 411 U.S. 233 (1973) provides the standard for relief from waiver, the test is "cause" and not "actual prejudice." *Davis* and *Shotwell Mfg. Co. v. United States*, 371 U.S. 341 (1963) looked to prejudice only after it was clear that no "cause" was shown. The Fifth Circuit sees the two matters as separate ones, but applied an "actual prejudice" test to petitioner Francis because Louisiana's forfeiture statute was absolute.

In doing so it created a harsher test for state prisoners than that required of federal prisoners. Since Louisiana's interest in compelling a timely grand jury challenge motion is the same as the federal government's, there is no reason to impose a more stringent standard to state petitioners seeking federal habeas corpus, especially since "waiver affecting federal rights is a federal question", *Fay v. Noia*, 372 U.S. at 439. To accord a federal prisoner easier access than a state prisoner is completely inconsistent with this history of the writ and its intended availability to preserve the constitutional rights of state defendants.

The incompetenteness of Francis' appointed counsel, measured by his not having handled a criminal matter in many years, his filing motions only the day before the trial, and his failure to preserve his client's right to appeal is sufficient "cause" to excuse the failure to make a timely challenge.

III. If the test to be applied is one of "actual prejudice", Francis has made a prima facie showing and on the remand ordered by the Fifth Circuit, the burden should be upon the state to show that there was no prejudice.

The crime had racial overtones. The decision to charge was made by the district attorney and involved the first time in the recollected history of Orleans Parish that a person was indicted for felony murder where the deceased was a co-perpetrator. The trial court appointed inexperienced counsel and tolerated conduct which was inconsistent with the precepts of *Powell v. Alabama*, 287 U.S. 45 (1932) requiring "effective aid" of counsel. The failure to create a record on appeal makes it impossible to assume that Francis had a fair trial. Thus, the totality of the circumstances of this case constitute a prima facie showing of prejudice which the state must rebut in order to foreclose relief, even under the harshest application of *Davis*.

ARGUMENT

I.

JOHNSON V. ZERBST, 304 U.S. 458 (1938) AND *FAY V. NOIA*, 372 U.S. 391 (1963) PROVIDE THE PROPER STANDARD FOR DETERMINING WAIVER AND THE AVAILABILITY OF FEDERAL HABEAS CORPUS RELIEF FOR A CONVICTED STATE PRISONER WHO DID NOT COMPLY WITH STATE PROCEDURAL RULES FOR CHALLENGING THE COMPOSITION OF THE GRAND JURY WHICH INDICTED HIM.

The Writ of Habeas Corpus is a sacred part of our heritage:

> Although in form the Great Writ is simply a mode of procedure, its history is inextricably intertwined

with the growth of fundamental rights of personal liberty. For its function has been to provide a prompt and efficacious remedy for whatever society deems to be intolerable restraints. Its root principle is that in a civilized society, government must always be accountable to the judiciary for a man's imprisonment: if the imprisonment cannot be shown to conform with the fundamental requirements of law, the individual is entitled to his immediate release. Thus there is nothing novel in the fact that today habeas corpus in the federal courts provides a mode for the redress of denials of due process of law. Vindication of due process is precisely its historic office.

Fay v. Noia, 372 U.S. 391, 401-402 (1963).

When a state proceeds by indictment, as Louisiana was required to do in charging Francis with murder, LSA Const. Art. I, §9, the right to be indicted by a constitutionally composed grand jury is a fundamental right. It is guaranteed by the Equal Protection Clause and supported by nearly a century of this Court's decisions:

> For over 90 years, it has been established that a criminal conviction of a Negro cannot stand under the Equal Protection Clause of the Fourteenth Amendment if it is based on an indictment of a grand jury from which Negroes were excluded by reason of their race. *Strauder v. West Virginia*, 100 U.S. 303 (1880); *Neal v. Delaware*, 103 U.S. 370 (1881). Although a defendant has no right to demand that members of his race be included on the grand jury that indicts him, *Virginia v. Rives*, 100 U.S. 313 (1880), he is entitled to require that the State not deliberately and systematically deny to members of his race the right to participate as jurors in the administration of justice. *Ex parte Virginia*, 100 U.S. 339 (1880); *Gibson v. Missis-*

> *sippi*, 162 U.S. 565 (1896). Cf. *Hernandez v. Texas*, 347 U.S. 475 (1954).
>
> *Alexander v. Louisiana*, 405 U.S. 625, 628-629 (1972) (footnote omitted).

Only if Abraham Francis has somehow waived that right can he be precluded from vindicating it via federal habeas corpus.

A. The Standards for Determining Waiver of Constitutional Rights.

A waiver is "an intentional relinquishment or abandonment of a known right or privilege." *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938). Courts should "indulge every reasonable presumption against waiver", *Aetna Insurance Co. v. Kennedy*, 301 U.S. 389, 393 (1937), and they should "not presume acquiescence in the loss of fundamental rights." *Ohio Bell Tel. Co. v. Public Utilities Commission*, 301 U.S. 292, 307 (1937). The failure of a state court defendant to actively assert a fundamental constitutional right cannot be deemed a waiver: "Presuming waiver from a silent record is impermissible." *Carnley v. Cochran*, 369 U.S. 506, 516 (1962).

These doctrines were recently reaffirmed in *Barker v. Wingo*, 407 U.S. 514, 525-526 (1972). There the Court placed some responsibility upon a defendant to assert a speedy trial claim, but cautioned:

> . . . we do not depart from our holdings in other cases concerning the waiver of fundamental rights, in which we have placed the entire responsibility on the prosecution to show that the claimed waiver was knowingly and voluntarily made. Such

cases have involved rights which must be exercised or waived at a specific time or under clearly identifiable circumstances, such as the rights to plead not guilty, to demand a jury trial, to exercise the privilege against self incrimination, and to have the assistance of counsel.

Id. 407 U.S. at 529.

While the enumerated rights in *Barker* do not mention grand jury challenges, the listing is clearly not an exclusive one. Nor have this Court's decisions applying the historical waiver standards to state prisoners seeking federal habeas corpus relief limited their effect to only certain constitutional rights.

B. *Fay v. Noia*, 372 U.S. 391 (1963) Established That The *Johnson v. Zerbst* Standard Is The Applicable Test for Determining if a State Prisoner Has Waived His Federal Claims for Federal Habeas Corpus Purposes.

In *Fay v. Noia*, the Court concluded that only if a state prisoner deliberately by-passed the orderly procedure of the state courts would he forfeit his right to assert his constitutional claim in federal habeas proceedings. The test for determining deliberate by-pass was clear:

> The classic definition of waiver enunciated in *Johnson v. Zerbst*, 304 U.S. 458, 464, 'an intentional relinquishment or abandonment of a known right or privilege' – furnishes the controlling standard. If a habeas applicant, after consultation with competent counsel or otherwise, understandingly and knowingly forwent the privilege of seeking to vindicate his federal claims in the state courts, whether for strategic, tactical, or any other

> reasons that can fairly be described as the deliberate by-passing of state procedures, then it is open to the federal court on habeas to deny him all relief if the state courts refused to entertain his federal claims on the merits – though of course only after the federal court has satisfied itself, by holding a hearing or by some other means, of the facts bearing upon the applicant's default. Cf. *Price v. Johnston*, 334 U.S. 266, 291. At all events we wish it clearly understood that the standard here put forth depends on the considered choice of the petitioner.

Id. 372 U.S. at 438-439.

The vitality of *Fay* is confirmed by many decisions of this Court. See, *Jackson v. Denno*, 378 U.S. 368, 370 n. 1 (1964); *Henry v. Mississippi*, 379 U.S. 443, 452-453 (1964); *Humphrey v. Cady*, 405 U.S. 504, 516-517 (1972); *Barker v. Wingo*, 407 U.S. 514, 525-526, 529 (1972); *Murch v. Moltram*, 409 U.S. 41 (1972). More recently in *Lefkowitz v. Newsome*, ____ U.S. ____, 95 S.Ct. 886, 43 L.Ed.2d 196 (February 19, 1975), the Court noted:

> . . . even when state procedural grounds are adequate to bar direct review of a conviction in this Court, federal habeas corpus relief is nonetheless available to litigate the defendant's constitutional claims unless there has been a deliberate by-pass of the state procedures. See *Fay v. Noia*, 372 U.S. 391, 428-431.

Id. 43 L.Ed.2d at 202 n. 6.[10]

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[10]Three dissenting Justices in *Lefkowitz* agreed that "federal issues are 'preserved' for habeas corpus purposes unless state procedures for litigating them have been 'deliberately by-passed.' 43 L.Ed.2d at 206. But Mr. Justice White, joined by the Chief Justice and Mr. Justice Rehnquist believed that a guilty plea foreclosed collateral relief, even though New York permitted an

While this Court has not explicitly applied the *Johnson v. Zerbst* waiver test to a grand jury discrimination challenge, it has applied it to combined grand and petit jury challenges in several situations. In *Peters v. Kiff*, 407 U.S. 493, 494 n. 1 (1972) the Court considered the federal habeas corpus claims of a state defendant who had not made timely state challenges. In *Whitus v. Balkcom*, 370 U.S. 728 (1962) the Court vacated a decision of the Fifth Circuit which affirmed a district court dismissal of Whitus' habeas corpus petition in which he, for the first time, attacked the composition of the grand and petit juries. See the discussion in *Whitus v. Georgia*, 385 U.S. 545, 547–548 (1967).

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appeal of the constitutional issues Lefkowitz sought to raise notwithstanding his guilty plea. Justice White pointed out that in *Tollett v. Henderson*, 411 U.S. 258 (1973) the Court precluded a state prisoner who pled guilty from challenging his indictment in a federal habeas corpus petition, viewing the guilty plea as a "break in the chain" which bars him from raising "independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea." 43 L.Ed.2d at 205. Justice White contended that the *Tollett* principles applied equally to Lefkowitz.

Tollett, decided along with *Davis v. United States*, 411 U.S. 233 (1973) noted that it "left open" the issue posited in this case by Mr. Francis. *Tollett*, 411 U.S. at 260 n. 1. However, *Tollett* did agree that:

> If the issue [in the case] were to be cast solely in terms of 'waiver', the Court of Appeals was undoubtedly correct in concluding that there had been no such waiver here.
>
> 411 U.S. at 266.

We submit that the issue for a state defendant seeking to raise grand jury exclusion on federal habeas after a plea of not guilty and trial by jury is one of "waiver" under the *Johnson v. Zerbst* standards applied by the Sixth Circuit in *Tollett*.

Prior to the decision in *Davis v. United States*, the Circuit Courts of Appeals which faced the grand jury challenge issue ruled that the *Johnson - Fay* rationale provided the controlling standard.[11] We believe that those holdings were correct. But first *Davis v. United States* must be assessed.

C. *Davis v. United States*, 411 U.S. 233 (1973) Applies Only to Federal Defendants Who Failed to Comply with Rule 12(b)(2) of The Federal Rules of Criminal Procedure and Later Seek Post Conviction Relief Under 28 U.S.C. §2255.

In *Davis*, the Court held that the express waiver provisions of Rule 12(b)(2) of the Federal Rules of Criminal Procedure acted as a limitation on federal habeas review (28 U.S.C. §2255) of a defendant's claim that his indictment was invalid because of racial exclusions in the grand jury selection process. The Court came to that conclusion because:

> We think it inconceivable that Congress, having in the criminal proceeding foreclosed the raising of a claim such as this after the commencement of trial in the absence of a showing of 'cause' for relief from waiver, nevertheless intended to perversely negate the Rule's purpose by permitting an

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[11] *Labat v. Bennett*, 365 F.2d 698 (5th Cir., *en banc*, 1965); *Winters v. Cook*, 489 F.2d 174 (5th Cir. *en banc*, 1973); *McNeil v. North Carolina*, 368 F.2d 313 (4th Cir. 1966); *Henderson v. Tollett*, 459 F.2d 237 (6th Cir. 1972), rev'd on other grounds, *Tollett v. Henderson*, 411 U.S. 233 (1973); *Wade v. Yeager*, 377 F.2d 841 (3rd Cir. 1967).

entirely different but much more liberal requirement of waiver in federal habeas proceedings.

Id. 411 U.S. at 242.

The Court made it clear that its rejection of the *Kaufman v. United States,* 394 U.S. 217 (1969) knowing and deliberate by-pass waiver standard was due to the existence of 12(b)(2). In *Kaufman* ". . . Congress did not deal with the question of waiver in the federal habeas statute . . . and this Court held that since the federal statute had not spoken on the subject of waiver with respect to claims of unlawful search and seizure, a particular doctrine of waiver would be applied by this Court in interpreting the statute." *Davis,* 411 U.S. at 242.

Thus, it is apparent that where Congress has not established a specific waiver doctrine, this Court is free to decide the appropriate standards for access to federal habeas corpus relief. In the federal habeas statute for state prisoners (28 U.S.C. §2254) Congress precluded only those who had not exhausted state remedies and *Fay v. Noia* rejected any more preclusive theory. 372 U.S. at 434-435. No reason exists to adopt a more stringent standard for state prisoners making grand jury challenges in federal habeas proceedings.

D. The *Johnson* - *Fay* Standard is the Proper Test to be Applied to State Defendants Raising The Question of Racial Exclusion in the Selection of a Grand Jury in Federal Habeas Corpus Proceedings.

Louisiana argues that "the waiver principle of *Davis* should apply equally to the several states." Response to

Petition for Writ of Certiorari, p. 3. But different considerations come into play when federal habeas corpus is invoked by a state prisoner and to accept Louisiana's invitation would be to reject the important historical role of federal habeas, especially in the area of grand jury racial exclusions.

The Court has accepted the principle that 'There is undoubtedly a difference in the way federal courts should treat post conviction applications by state and federal prisoners.' *Kaufman v. United States,* 394 U.S. 217, 230 (1969). The will being carried out is that of Congress:

> Congress in 1867 sought to provide a federal forum for state prisoners having constitutional defenses by extending the habeas corpus powers of the federal courts to their constitutional maximum. Obedient to this purpose, we have consistently held that federal court jurisdiction is conferred by the allegation of an unconstitutional restraint and is not defeated by anything that may occur in the state court proceedings. State procedural rules plainly must yield to this overriding federal policy.
>
> *Fay v. Noia,* 372 U.S. at 426-427.

That policy is "that federal constitutional rights of personal liberty shall not be denied without the fullest opportunity for plenary federal judicial review." *Fay v. Noia,* 372 U.S. at 424. A federal defendant, like *Davis,* has already had such a right. The importance of providing it to state defendants is based upon:

> . . . the inadequacy of state procedures to waive and preserve federal claims, the concern that state judges may be unsympathetic to federally created rights [and] the institutional constraints on the exercise of this Court's certiorari jurisdiction . . .

Kaufman v. United States, 394 U.S. at 225-226.

In addition, this Court's supervisory powers over the administration of criminal justice in the federal courts offers an added degree of protection to federal defendants' constitutional rights. See, *Thiel v. Southern Pacific Co.*, 328 U.S. 217, 225 (1946); *Ballard v. United States*, 329 U.S. 187, 192 (1946); *McNabb v. United States*, 318 U.S. 332 (1943).[12]

These considerations led the Fifth Circuit, prior to the *Davis* decision, to conclude that there could be different standards for federal and state prisoners making similar post conviction collateral attacks on grand jury indictments. Thus 12(b)(2) was applied to federal petitioners under §2255 and the *Johnson - Fay* test to state petitioners under §2254. Compare, *Davis v. United States*, 455 F.2d 919, aff'd, 411 U.S. 233 (1973) with *Labat v. Bennett*, 365 F.2d 698, 707-711 (1965).

The need for federal courts to "have the last say with respect to questions of federal law" (*Kaufman*, 394 U.S. at 225) relating to grand jury discrimination is especially strong. It may be that the waiver policy of 12(b)(2) applied in *Davis* is not unreasonable considering the rareness of successful federal jury challenges.[13]

[12]It is doubtful that in the federal court system a lawyer who had not tried a capital case in fifteen years would be appointed to represent a teenaged defendant on trial for his life. Nor would a motion to suppress be denied without a hearing, and the right to appeal treated so cavalierly. The facts of this case underscores the concerns voiced in *Fay* and accepted in *Kaufman*.

[13]*Thiel v. Southern Pacific Co.*, 328 U.S. 217 (1946); *Ballard v. United States*, 329 U.S. 187 (1946); *Glasser v. United States*, 315 U.S. 60 (1940).

The adoption of the 1968 Jury Selection Act, 28 U.S.C. §1861 et seq. insures the integrity of future federal grand jury selection methods.

But state grand jury discrimination claims based upon the exclusion of Negroes are another matter. Since 1880 such discrimination has been unconstitutional. *Strauder v. West Virginia*, 100 U.S. 303. The right to a non-exclusionary grand jury predates by fifty years the extension of the Sixth Amendment right to counsel to state defendants. *Powell v. Alabama*, 287 U.S. 45, (1932). It predates by eighty-one years the extension of the Fourth Amendment to a state prisoner. *Mapp v. Ohio*, 367 U.S. 643 (1961). (Yet failure to timely preserve those rights does not foreclose federal habeas absent a showing of knowing and intelligent waiver.) The public policy reasons for protecting against racial discrimination in jury selection are so strong that Congress, in 1875, made it a crime for state (and federal) officials to exclude persons from grand or petit jury service because of race. 18 Stat. 336, as amended 18 U.S.C. §243.

Nevertheless, since 1880, claims of racial discrimination in state grand jury selection methods have constantly occupied the Court and have almost always resulted in the Court declaring unconstitutional the selection methods utilized in a handful of states.[14] The ongoing need to correct deficient grand jury selection

[14]The Court held that exclusion of Negroes from grand juries was unconstitutional in: *Alexander v. Louisiana*, 405 U.S. 625 (1972); *Arnold v. North Carolina*, 376 U.S. 773 (1964); *Eubanks v. Louisiana*, 356 U.S. 584 (1958); *Reece v. Georgia*, 350 U.S. 85 (1955); *Cassell v. Texas*, 339 U.S. 282 (1950); *Hill v. Texas*, 316 U.S. 400 (1942); *Smith v. Texas*, 311 U.S. 128 (1940); *Pierre v. Louisiana*, 306 U.S. 354 (1939); *Rogers v. Alabama*,

methods reflects an insensitivity by certain states to the importance of constitutional precepts in selecting grand juries.

The Fifth Circuit, more than any other, has had to contend with claims of grand jury discrimination. That Court, until *Davis,* hued to the *Johnson - Fay* test in assessing the petitions of state prisoners who had not made timely state challenges.[15] Indeed, the Fifth Circuit, recognizing the facts of jury challenge life in its jurisdiction "consistently [took] a jaundiced view of waiver in habeas proceedings in which the state has relied on the petitioner's failure to make a timely objection to the exclusion of Negroes from juries." *Labat v. Bennett,* 365 F.2d at 708 n. 14.

Access to federal habeas corpus relief has been a prime factor motivating states to remedy deficient

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192 U.S. 226 (1904); *Carter v. Texas,* 177 U.S. 442 (1900); *Bush v. Kentucky,* 107 U.S. 110 (1883).

In the following cases the Court condemned exclusion of Negroes in grand and petit juries: *Sims v. Georgia,* 389 U.S. 404 (1967); *Jones v. Georgia,* 389 U.S. 24 (1967); *Whitus v. Georgia,* 385 U.S. 545 (1967); *Coleman v. Alabama,* 377 U.S. 129 (1964); *Patton v. Mississippi,* 332 U.S. 463 (1947); *Hale v. Kentucky,* 303 U.S. 613 (1938); *Norris v. Alabama,* 294 U.S. 587 (1935); *Martin v. Texas,* 200 U.S. 316 (1906); *Neal v. Delaware,* 103 U.S. 370 (1881); *Strauder v. West Virginia,* 100 U.S. 303 (1880).

[15] *Labat v. Bennett,* 365 F.2d 698, 707-711 (1966) (*en banc*); *Cobb v. Balkcom,* 339 F.2d 95 (5th Cir. 1964); *Whitus v. Balkcom,* 333 F.2d 496 (5th Cir. 1964); *Whippler v. Balkcom,* 342 F.2d 388 (5th Cir. 1965); *State of Louisiana v. Newton,* 343 F.2d 161 (5th Cir. 1965) (affirming, per curiam, *In re: Newton,* 224 F.Supp. 330 (W.D. La. 1963); *Peters v. Kiff,* 441 F.2d 371 (5th Cir. 1971), rev'd on other grounds, *Peters v. Kiff,* 407 U.S. 493 (1972); *Davis v. Smith,* 430 F.2d 1256 (5th Cir. 1970); *Winters v. Cook,* 489 F.2d 174 (5th Cir. 1973) (*en banc*).

grand and petit jury selection practices. The Court was correct when it said:

> The availability of post conviction relief serves significantly to secure the integrity of proceedings at or before trial and on appeal. . . . Thus, collateral relief . . . contributes to the present vitality of all constitutional rights whether or not they bear on the integrity of the fact finding process.
>
> *Kaufman v. United States,* 394 U.S. 217, 229 (1969).

Thus, a Mississippi author, spurred by federal habeas and state court cases, urged the adoption of new selection methods to remedy racial discrimination in grand and petit juries. Corlew, "Mississippi Jury Selection: A Proposed Statute," 40 Miss. L.J. 393 (1964). And in *Whitus v. Balkcom,* 370 U.S. 728 (1962) the Court, by breathing life into Whitus' out of time grand and petit jury challenge made in a federal habeas corpus petition, set in motion a chain of events which ultimately led to Georgia enacting a jury selection statute patterned on the federal statute, after the state's procedures were found deficient in *Whitus v. Georgia,* 385 U.S. 545 (1967). *Jury Discrimination in the South: A Remedy?* 8 Colum. J. of Law and Soc. Prob. 589, 612 n. 155 (1972). As that Note points out however, no panacea has been found to cure discrimination in the grand and petit jury systems and the promises of *Strauder* are still unfulfilled in many jurisdictions.[16]

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[16] The author lists over 70 affirmative suits brought under 42 U.S.C. §1983 since 1966 to remedy jury discrimination. *Ibid,* 621-622. Forty of the suits were won by plaintiffs. *Id.* 617-618.

But since the nineteen-sixties, the *Johnson - Fay* test has served an important role by providing relief for black defendants who have been indicted by unconstitutionally selected grand juries. The test not only vindicated their constitutional rights, it prompted state and local compliance with longstanding constitutional jury guarantees and made defense lawyers aware of their obligation to protect those rights. Every participant in the criminal justice process was put on notice that ninety years of law was not to be taken lightly.

There is no reason to terminate that vigilance. The *Johnson - Fay* standards protect against federal habeas review where there has been a willfull withholding of a grand jury challenge by a defendant who deliberately seeks "to subvert or evade the orderly adjudication of his federal defenses in state courts." *Fay v. Noia*, 372 U.S. at 433. Absent such a by-pass, the historical considerations are paramount. The right of a state prisoner to have plenary federal review of his federal constitutional rights; the absence of any Congressional waiver provision in 2254; the fact that the right involved has been established for nearly a century and has been disregarded so often by the states, are all compelling factors which call for the application of the *Johnson - Fay* test to state defendants challenging grand jury discrimination on federal habeas corpus.

E. Under the *Johnson - Fay* Standard, The Petitioner is Entitled to Relief.

The District Court found that there had been no knowing and intelligent waiver by Francis of his right to challenge the grand jury which indicted him. The finding was not challenged by the state on appeal and

the Fifth Circuit did not disturb it. The District Court's conclusion is supported by overwhelming evidence.

Francis was not told by anyone of his right to attack either the grand or petit juries. App. 61. Amadee did not recall discussing a jury challenge with Tureaud App. 26, but stated, "if we did I am of the opinion he wouldn't have done it because Mr. Tureaud is a man that doesn't believe in what he calls wasted effort." App. 26. In response to the question of whether he thought such a motion would have been a wasted effort, Amadee replied:

> A. Like I told you, I wasn't in the case at the outset, I was representing a co-defendant by the name of Jerry Anderson. It was only – I would say some several months before the trial that Mr. Touro asked me to come into the Francis case. Mr. Touro had been his attorney I would say maybe some four or five months before I came into the case. When you come into a case like that sort of haphazard things have been done, you don't question them and apparently I didn't.
>
> Q. Were you aware that any attacks on the makeup of the grand jury and petit juries of Orleans Parish were being made at that time through the Labat and Merritt case?
>
> A. I knew they were being made and I made it in quite a few cases myself.
>
> App. 26.

Nevertheless, no attack was made. Certainly no strategic or tactical reason existed for not making the challenge. Francis was not pleading guilty, he was forced to go to trial for his life. Contesting the validity of his indictment would not have placed him in greater jeopardy. No trial advantage could be gained by

withholding the grand jury claim. The only conclusion is the one reached below: Francis did not knowingly and intelligently waive his right to challenge the grand jury. Nor is there any satisfactory explanation for his lawyer's failure to do it. (The record is silent on the issue of whether Tureaud was actually aware of the availability of such a challenge.) Under any application of the *Johnson - Fay* standards, Francis would be entitled to federal habeas corpus relief.

II.

EVEN IF *DAVIS V. UNITED STATES*, 411 U.S. 223 (1973) PROVIDES THE STANDARD BY WHICH TO JUDGE THE AVAILABILITY OF FEDERAL HABEAS CORPUS RELIEF, THE TEST IS ONE OF "CAUSE" NOT "ACTUAL PREJUDICE". SINCE FRANCIS SHOWED "CAUSE", HE IS ENTITLED TO RELIEF.

Davis applied the test of F.R. Crim. P. 12(b)(2) to a collateral attack upon a grand jury's composition. That rule provides, *inter alia*, that an alleged defect in an indictment must be raised before trial and failure "constitutes a waiver thereof, but the Court for cause shown may grant relief from the waiver." The Court relied upon *Shotwell Mfg. Co. v. United States*, 371 U.S. 341 (1963), which similarly involved the 12(b)(2) waiver-cause principle, albeit in a situation involving a belatedly filed motion in the original proceedings.

In both cases, the Court found that the tardy defendants had not shown cause. Davis had extremely

competent appointed counsel.[17] The *Shotwell* defendants also had able counsel, who twice represented them before this Court.[18] In both cases the facts of the grand jury selection methods were open and known.

Having found no cause the Court considered the absence of prejudice as totally foreclosing any relief from the waiver provisions in both *Davis* and *Shotwell*.

Thus, the test of *Davis* and *Shotwell* is that failing to show "cause", and absent "prejudice" a 12(b)(2) forfeiture cannot be revived. But if cause is shown, prejudice need not be.

Davis and *Shotwell* do not make this distinction as neatly as we do because the lack of cause alone was apparent in each case and the Court therefore moved directly into the prejudice discussion. As we point out below, the Fifth Circuit has seen the components as separate ones and 12(b)(2) does not speak at all of prejudice. While we comprehend the distinction between the presumption of prejudice in a pre-trial motion and the need to show it in a post-trial one, *Davis*, 411 U.S. at 245, that does not mean that prejudice becomes the *sine qua non* for proving "cause." If that were so, 12(b)(2) would have been effectively rewritten by *Davis*.

The Fifth Circuit views cause as a matter which need not include prejudice. In state petitioner cases, where the state rule affords relief if "cause" is shown, then that aspect of *Davis* is applied. *Van Eaton v. Wainwright*, 508 F.2d 849 (5th Cir. 1975). But here, because Louisiana creates an airtight system of

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[17] 411 U.S. at 234, n. 1.

[18] *United States v. Shotwell Mfg. Co.*, 355 U.S. 233 (1957); *Shotwell Mfg. Co. v. United States*, 371 U.S. 341 (1963).

forfeitures, the Fifth Circuit requires a showing of "actual prejudice", not merely "cause" as a pre-condition for affording relief. *Francis v. Henderson*, 496 F.2d at 896, 899.[19]

Thus, a state prisoner, seeking relief from an alleged waiver of his federal constitutional rights, is subjected to a harsher relief from waiver standard than a federal prisoner. That cannot be.

A. The Standards for Collateral Review for A State Defendant Cannot be Harsher than those Required of a Federal Defendant.

While it is true that Louisiana can create a system of absolute forfeitures of federal constitutional rights which will govern its review of untimely claims, *Michel v. Louisiana*, 350 U.S. 91 (1953) it is equally true that:

> . . . a state court's finding of waiver [does not] bar independent determination of the question by the federal courts, for waiver affecting federal rights is a federal question. E.g., *Rice v. Olsen*, 324 U.S. 786.

Fay v. Noia, 372 U.S. at 439.

Obviously the Court below agreed and found it necessary to engraft some relief into the Louisiana

[19]See also *DuMont v. Estelle*, ____ F.2d ____ (5th Cir. May 30, 1975), where a Fifth Circuit panel applied the "actual prejudice" test to the Texas waiver rule which makes no allowance for "cause", citing *Newman and Francis v. Henderson*. However, the day before, another Fifth Circuit panel remanded a Texas case for a determination of waiver citing *Fay v. Noia* and *Van Eaton v. Wainwright, supra*. *Eggleston v. Estelle*, ____ F.2d ____ (5th Cir. May 29, 1975).

forfeiture provision. Our quarrel is with the grafted standard.

Louisiana's interest in requiring timely pre-trial indictment motions is no greater than the interest 12(b)(2) seeks to protect. It is the interest in having defendants make their grand jury challenges prior to trial so errors can be corrected then, instead of delaying in the hope that "the claim could be used to upset an otherwise valid conviction at a time when reprosecution might well be difficult." *Davis*, 411 U.S. at 241.[20] The state has conceded that its concerns are not different from the federal government's. Contending that the district court erred in not using the *Davis* standard, Louisiana wrote: "Unless a distinction is based upon differing policy reasons behind the federal and state rules, it [the district court decision] should not stand. As stated before, the federal and state policy coincide on this point." Brief of State of Louisiana in the Fifth Circuit, p. 6.

Since Louisiana's interests are no greater than the federal ones, no reason exists which justifies the imposition of a harsher relief from waiver standard upon a state prisoner than upon a federal prisoner. To do so would give greater preclusive effect to procedural defaults by state defendants than to similar defaults by federal defendants. That would be an ironic twist to *Kaufman v. United States*, 394 U.S. 217 (1969). There, the Court refused to indulge the government's argument that a federal prisoner's access to federal collateral remedies should be more limited than a state prisoner's access.

[20]As we have pointed out, such a deliberate delay would preclude relief even under *Fay*. Compare Mr. Justice Marshall's dissent in *Davis*, 411 U.S. at 249-252.

> There is no reason . . . to give greater preclusive effect to procedural defaults by federal defendants than to similar defaults by state defendants.

Id. 394 U.S. at 228.

As we have argued above, there are reasons which justify a more restrictive waiver rule for federal defendants making an out of time collateral attack on a grand jury indictment. At the least, a state defendant's access to federal habeas relief should not be made more difficult than a federal petitioner's. "Cause", not "actual prejudice" can be the most stringent test imposed upon a state petitioner.[21]

B. Abraham Francis Has Shown "Cause" Which Entitles Him to Relief.

The district court, after deciding that there was no waiver, assumed for argument purposes that the *Davis* "cause" standard applied, and decided that good cause did exist. App. 91. The Fifth Circuit took no issue with the finding and its basis. "Francis had been represented by a civil lawyer, unskilled in the intricacies of criminal practice, who had, by his inexperience, allowed the

[21] An "actual prejudice" test under the Louisiana scheme is singularly inappropriate. Because the rule required the challenge to be made within three days after the end of the grand jury term, a defendant could make a pre-trial challenge but still be barred because it was made beyond the three day limit. If that defendant then had to show prejudice to obtain relief, the presumption of prejudice which exists pre-trial would be nullified although no state interest could have been harmed because a new pre-trial indictment could be returned. That underscores the unrealistic harshness of the "prejudice" test as applied to the then applicable Louisiana practices.

time for challenging the indictment to pass without objecting to the grand jury's composition." App. 97; 496 F.2d at 897-898.

There is no doubt about the correctness of the assessment of Francis' lawyer. If anything, it was charitable. Tureaud had not handled a murder case "in about fifteen years." App. 23. Although appointed on February 9, 1965, he did not file his first motion until the day before trial, June 23, 1965 and that, on a form borrowed from the district attorney, sought a continuance App. 13. Because he was so unfamiliar with criminal practice he associated another lawyer, Mr. Amadee, as a "trial expert" App. 27. The two lawyers met with Francis 'two or three times" and one or two of those interviews were "in court while awaiting for trial" App. 23.[22]

Amadee took no responsibility for filing Francis' pre-trial motions other than offering advice to Tureaud App. 27.[23] He did not recall discussing the grand jury matter with him, but asserted that Tureaud would not have filed one anyway because it would have been "wasted effort" App. 26.

The picture of ineffectiveness is rounded out by the filing of a motion to suppress the confession on the morning of trial App. 30; its denial without a hearing; the probable failure to reserve a bill for exceptions to

[22] Tureaud did meet alone with Francis in the Parish prison but the record does not reflect the time, length or number of those meetings. App. 56.

[23] Even if Amadee were viewed as having some formal responsibility to Francis, he would have had to be associated with Tureaud by March 4, 1965 in order to make a timely challenge. See note 6, supra. While Amadee was vague as to dates, it appears that Tureaud was solely responsible for the challenge on March 4, the date it had to be made. See App. 26, 38.

the denial App. 62-63; and the failure to appeal in spite of Francis' stated desire to appeal App. 36.

Ineffective counsel is the touchstone of the "cause shown" inquiry. *Davis* took pains to point out the competency of Davis' lawyer, 411 U.S. at 234, n. 1. In a post *Davis* decision, the Fifth Circuit did likewise. *Morris v. Sullivan*, 497 F.2d 544, 545 (5th Cir. 1974). *Tollett v. Henderson*, 411 U.S. 258, 268 (1973) required a prisoner to show that the advice of his counsel was not within the "range of competence demanded of attorneys in criminal cases" in order to set aside a guilty plea and mount a grand jury attack. Francis has surpassed the Davis and the *Tollett* standards. The ineptness of his counsel is sufficient cause to relieve him from a pre-trial failure to challenge the grand jury.[24]

If one must show more than ineffective assistance in order to be relieved from the effects of a procedural waiver rule, the longstanding constitutional protections

[24]Compare the "hypothetical case" presented by Mr. Justice Harlan in his dissent in *Fay v. Noia*, 372 U.S. at 448, 463-464. He saw incompetentness of counsel as a factor which, if shown, would permit reversal on direct review of a conviction obtained after indictment by an exclusionary grand jury although a timely challenge had not been made. Justice Harlan's footnote, 372 U.S. at 464 n. 20, to *Michel v. Louisiana* emphasizes that factor. In rejecting Edgar Labat's assertion that ineffective counsel was the reason no timely motion to quash was filed, the Court in *Michel* noted that his counsel "was a well known criminal attorney" who had been honored by the New Orleans Bar as an 'astute and honored criminal lawyer.' *Michel*, 350 U.S. at 101 n. 7. The fact that he failed to file a timely motion to quash did "not overcome the presumption of effectiveness." 350 U.S. at 101. Francis has overcome the presumption.

against grand jury discrimination will have been seriously eroded. The Fifth Circuit did that when it subjected Francis to an "actual prejudice" test. We believe we have shown that such a test goes too far, but even if it was appropriate, Francis passed it and was entitled to relief.

III.

IF THE TEST IS ONE OF ACTUAL PREJUDICE, ABRAHAM FRANCIS HAS MADE A PRIMA FACIE CASE WHICH MEETS THAT STANDARD. THE BURDEN MUST NOW BE PLACED UPON THE STATE TO OVERCOME HIS SHOWING OF ACTUAL PREJUDICE.

The Fifth Circuit remanded Francis' case "to permit a determination of whether the facts presented by Francis constitute a showing of prejudice which would excuse his non-compliance with the state's rule of criminal procedure." 496 F.2d at 899; App. 100. We contend that the petitioner has, upon the facts already developed, made a prima facie showing of prejudice. Therefore, if there is to be such a remand, the burden should now be upon the state to show that Francis was not the subject of prejudice.

In *Davis*, the lack of prejudice stemmed from these facts:

> The same grand jury that indicted petitioner also indicted two white accomplices. The case has no racial overtones. The government's case against petitioner was, although largely circumstancial, a strong one. There was certainly sufficient evidence

against petitioner to justify a grand jury in determining that he should stand trial for the offense with which he was charged. . . .

411 U.S. at 243-244.

A point by point examination of the facts in this case reflect that Francis has made a prima facie showing of prejudice.

A. The Racial Aspect and the Uniqueness of the Charge.

The felony murder charge grew out of a grocery store robbery. The victims of the robbery were white and one, a woman, had been shot in the face; the perpetrators were black; one of the perpetrators was killed in the course of the robbery App. 71.

The prosecutor recalled the case because he responded to the police call along with the homicide detectives. He said:

> The thing that made this case different from the normal case was that the deceased on the sidewalk was one of the alleged perpetrators. After the handling of this matter it was decided by the District Attorney's office to prosecute the co-defendants or co-perpetrators of the robbery under the felony murder doctrine for the death of one of their perpetrators. This is the only time I recall this being done not only of my years out here but of my knowledge in Orleans Parish.

App. 71.

Would white perpetrators have been proceeded against under the felony murder doctrine? Why had no one been so charged in the recollected history of the Parish? Did the interracial nature of the crime, a black

man dead and a white woman shot, come into play in the charging decision? Did the grand jury discharge its historical function[25] or was it merely the alter ego of the district attorney's office which "decided" to prosecute . . . under the felony murder doctrine? App. 71. Would a fairly constituted grand jury have subjected a seventeen year old black boy to the possibility of losing his own life upon the district attorney's decision to invoke a rarely used crime?[26]

No one can say for sure what the answer to each of the posited questions is. But the undisputed facts which show racial overtones, a unique decision to charge, a decision made by the prosecutor and then affirmed by a grand jury already determined to be unconstitutionally selected, constitutes a prima facie showing of actual prejudice.

That showing is buttressed by the utter failure of the state trial court to protect Francis' rights. Here, unlike

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[25] *Gerstein v. Pugh*, ____ U.S. ____, 95 S.Ct. 854, 43 L.Ed.2d 54, 67 n. 19 (1975).

[26] No doubt, based upon his confession, a grand jury could have indicted Francis for something. But unlike *Davis* and most other cases, the charge against Francis required a more sophisticated understanding of the law and it cannot be said as unequivocally as it was in *Davis*, 411 U.S. at 244, that he should have been made to stand trial "for the offense with which he was charged."

The district attorney's role is reminiscent of the allegation made at oral argument in *Michel* that the prosecutor in New Orleans was more tolerant of white defendants who sought to make out of time jury challenges. Since that issue was not raised previously, the Court refused to consider it, but commented that if it had been, and "found support in the record, we might have a very different case here." 350 U.S. at 101-102. The record in this case does support a presumption of discrimination in the charging process. The issue was raised when the prosecutor initially testified about the unusual decision to charge.

Davis, there is no assurance that the state's case was a strong one or that Francis had a fair trial. If prejudice is the test, it must encompass all of the elements of injury which flowed from the indictment process.[27]

B. The Totality of the Circumstances Compels a Finding of Actual Prejudice.

In *Powell v. Alabama,* 287 U.S. 45, 71 (1932) defendants on trial for their lives were guaranteed the appointment of "effective" counsel. The trial court appointed a lawyer for Francis who "hadn't handled a murder case in about fifteen years" and who had not even handled "any criminal matters for years." App. 23, 31. The trial judge must have noticed that the first motions were not filed until the day before trial. Nor could he have failed to see that they were forms with a previous defendant's name struck out, or borrowed from the district attorney. See original trial record. Yet no concern was voiced for Francis' right to effective counsel.

The trial court denied the motion to suppress without a hearing, contrary to *Jackson v. Denno,* 378 U.S. 368, 376-377 (1964) which made it "clear" that a defendant has a constitutional right to have a "fair hearing and a reliable determination on the issue of voluntariness. . . ." It appears that no exception was

[27]The Fifth Circuit opinion viewed prejudice as an extremely narrow concept. The illustration it provided turned on a grand jury indicting a black defendant but not his two white accomplices. 496 F.2d at 899; App. 99-100. The use of that example as a measurement of prejudice would be the death knell for 2254 grand jury challenges by state petitioners. A result not envisioned by any authority.

taken to preserve an appeal on the confession issue. But even if one was, in the absence of an evidentiary record such an appeal would be meaningless.

The trial court's protection of Francis' appellate rights was limited, at best:

> Q. Does this defendant state at this time he does not intend to take an appeal?
>
> A. I am not.

App. 21.

In sum, beginning with an indictment which grew out of a unique decision to charge and has been found to have been returned by a grand jury from which Negroes were excluded, the petitioner has been tried, convicted and committed to prison for life by a process which falls short of due process.[28] Francis had one day in court – June 24, 1965. There is no way to be assured that his day in court was a fair one. The evidence he has presented compels the conclusion that he has carried his burden of showing actual prejudice.

If "actual prejudice" is the test, then on remand the State of Louisiana should have the burden of showing that Francis did not suffer such prejudice.

CONCLUSION

For the foregoing reasons, the petitioner respectfully submits that the decision of the United States Court of Appeals for the Fifth Circuit should be reversed, and

[28]Serious questions also exist as to the validity of the petit jury which tried Francis. The jurors for both grand and petit juries were chosen from the same wheel, *Labat v. Bennett,* 365 F.2d at 713-715. Given the district court's conclusion that the *Labat* practices existed during Francis' exposure to the Orleans Parish grand jury, it is most likely that his petit jury was exclusionary.

the opinion and judgment of the District Court for the Eastern District of Louisiana reinstated.

If the Court of Appeals decision is affirmed, then the petitioner submits that on the remand to the District Court for the Eastern District of Louisiana, the burden of proof should be upon the respondent to show that no actual prejudice occurred as a result of the grand jury indictment returned against Abraham Francis.

Respectfully submitted,

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